

10-15-2008

## "Good Moral Character" as a Licensing Standard

Larry Craddock

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), [Ethics and Professional Responsibility Commons](#),  
and the [Immigration Law Commons](#)

---

### Recommended Citation

Larry Craddock, *"Good Moral Character" as a Licensing Standard*, 28 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2008)  
Available at: <http://digitalcommons.pepperdine.edu/naalj/vol28/iss2/3>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

# **“Good Moral Character” as a Licensing Standard**

**By Larry Craddock\***

|                                                                                                                                                                                                                                                  |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| I. INTRODUCTION .....                                                                                                                                                                                                                            | 450 |
| II. DEFINITION OF “GOOD MORAL CHARACTER” .....                                                                                                                                                                                                   | 451 |
| III. SIMILARITIES AND DIFFERENCES BETWEEN THE GOOD<br>MORAL CHARACTER LICENSING STANDARD AND THE<br>OCCUPATIONS CODE LICENSING STANDARD .....                                                                                                    | 453 |
| IV. CASE LAW ALLOWING A LICENSING AUTHORITY TO DENY<br>A LICENSE FOR LACK OF GOOD MORAL CHARACTER ONLY<br>WHEN THERE IS A RATIONAL RELATION BETWEEN THE<br>CONDUCT THAT IS THE BASIS FOR DENIAL AND THE DUTIES<br>OF THE LICENSE IF GRANTED..... | 456 |
| V. HOW THE GOOD MORAL CHARACTER AND OCCUPATIONS<br>CODE STANDARD ISSUES ARISE.....                                                                                                                                                               | 459 |
| VI. THE HEARING .....                                                                                                                                                                                                                            | 462 |
| VII. SOME FACTORS HELD TO EVIDENCE GOOD AND BAD<br>MORAL CHARACTER, AND SOME FACTORS TO NEVER<br>CONSIDER IN MAKING MORAL CHARACTER<br>DETERMINATIONS.....                                                                                       | 463 |
| A. <i>Factors Which May Evidence Present Good Moral<br/>        Character and Fitness</i> .....                                                                                                                                                  | 464 |
| B. <i>Factors Which May Evidence Lack of Good Moral<br/>        Character and Fitness</i> .....                                                                                                                                                  | 465 |
| C. <i>Factors Never to Consider in Moral Character<br/>        Determinations</i> .....                                                                                                                                                          | 466 |
| VIII. APPLICATION OF THE GOOD MORAL CHARACTER<br>STANDARD IN CASES IN WHICH THE APPLICANT HAS<br>CONVICTIONS OF VERY SERIOUS OFFENSES: ARE SOME<br>ACTS SO BAD THAT THE APPLICANT SHOULD NEVER BE<br>RECONSIDERED FOR A LICENSE? .....           | 467 |
| IX. CLOSING THOUGHTS.....                                                                                                                                                                                                                        | 468 |

## I. INTRODUCTION

This paper explores use of good moral character as a licensing standard. It does this primarily in the context of the Mortgage Broker License Act (the Act), Chapter 156 of the Texas Finance Code.<sup>1</sup> I preside over hearings conducted under the Act, usually hearing several cases a month that involve denials of mortgage broker or loan officer license applications on good moral character grounds.<sup>2</sup>

Among other issues, this paper will address the similarities and differences between the good moral character standard and the standard for granting or denying a license under Chapter 53 of the Texas Occupations Code (the Occupations Code). The Occupations Code Standard allows an administrative agency to deny a license based on convictions or deferred adjudications for offenses directly related to the license.<sup>3</sup> An obvious difference between the Occupations Code Standard and the good moral character standard is that denials under the good moral character standard may or may not involve a conviction or deferred adjudication.<sup>4</sup> Beyond that, there is an overlap between the good moral character licensing standard and the Occupations Code Standard in many of the cases that come before me under the Act. Many of the applications denied on good moral character grounds also involve convictions or deferred

---

\* Judge Craddock has been Administrative Law Judge for the Texas Finance Commission agencies since 1995. He served as Administrative Law Judge for the Texas Department of Banking from 1992-1995. He is the current chair of the National Conference of Administrative Law Judges, Judicial Division, American Bar Association. Judge Craddock obtained his B.A. and his J.D. from the University of Texas at Austin. He presented this paper originally at the 19th Annual Advanced Administrative Law Course on September 20-21, 2007, in Austin, Texas. Judge Craddock is board certified in Administrative Law by the Board of Legal Specialization.

1. TEX. FIN. CODE ANN. § 156.001 (Vernon 2006). Most of this discussion applies to other agencies, but I am focusing on the standard as it applies in the cases with which I am most familiar.

2. My authority to conduct these hearings arises under sections 11.202 and 156.209 of the Texas Finance Code and title 7, section 80.16, of the Texas Administrative Code.

3. TEX. OCC. CODE ANN. § 53.021 (Vernon 2004).

4. See discussion *infra* Part III.

adjudications.

Most of the cases I see in which a license is denied on good moral character grounds involve false information on the license application, drug trafficking offenses, deadly weapons or firearms offenses, or a string of petty offenses indicating an irresponsible attitude toward the law.

## II. DEFINITION OF "GOOD MORAL CHARACTER"

The courts appear unable to come up with a uniform definition for the phrase "good moral character."<sup>5</sup> Nonetheless, legislatures have used good moral character as a standard in licensing attorneys and doctors since the memory of man runneth not to the contrary.<sup>6</sup> Many of the published cases interpreting and applying the good moral character standard involve attempts to deny applications for law licenses and to impose discipline on attorneys.<sup>7</sup> The federal government also uses good moral character as a standard in immigration cases involving the admission or deportation of immigrants into or out of this country.<sup>8</sup> The decisions from the attorney licensing cases and the immigration cases are the main precedents defining and applying the phrase good moral character that I will look to in this paper. Not much has been written about good moral character as a licensing standard outside the legal and medical professions.

There is widespread criticism of the use of good moral character as a licensing standard or a deportation standard.<sup>9</sup> Critics complain the term places too much discretion in officials to exercise their individual whims and prejudices.<sup>10</sup> These critics argue that the

---

5. See *infra* notes 17-19 and accompanying text.

6. Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494-96 (1985) (tracing the good moral character standard back to the thirteenth century).

7. See discussion *infra* Part IV.

8. 8 U.S.C.A. § 1154(a)(1)(A)(iii)(II)(bb) (West 2008).

9. See, e.g., Lisa H. Newton, *On Coherence in the Law: A Study of the "Good Moral Character" Requirement in the Naturalization Statute*, 46 TEMP. L.Q. 40 (1972).

10. See Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 90 (1984).

phrase fails to give helpful guidance to license applicants and license holders.<sup>11</sup> They argue that the standard forces those to whom it is applied to speculate about the course of conduct to which they must conform their behavior to become eligible for, or to retain, a professional or occupational license.<sup>12</sup> Similarly, in immigration cases, the critics complain the good moral character standard fails to give proper notice to foreign nationals of a course of conduct to which they must adhere to gain legal entry into, or to remain in, the United States.<sup>13</sup>

The merit of the critics' arguments is beyond the scope of this paper. Despite these arguments, the Texas legislature continues to draft new licensing statutes, which include a good moral character requirement, and Texas courts continue to uphold those statutes.<sup>14</sup> At the federal level, the U.S. courts also regularly uphold the good moral character requirement in licensing statutes and in the immigration laws.<sup>15</sup>

Black's Law Dictionary defines the phrase good moral character, in part, as

[a] pattern of behavior that is consistent with the community's current ethical standards and that shows an absence of deceit or morally reprehensible conduct . . . . A pattern of behavior conforming to a profession's ethical standards and showing an absence of moral turpitude. Good moral character is usu[ally] a requirement of persons applying to practice a profession such as law or medicine.<sup>16</sup>

Several courts have defined good moral character as “acts and conduct which would cause a reasonable man to have substantial

---

11. *See id.* at 89.

12. *See* Newton, *supra* note 9, at 68-70.

13. *See generally* V. Woerner, Annotation, *What Constitutes Showing of “Good Moral Character on the Part of an Applicant for Naturalization*, 22 A.L.R. 2d 244 (1952).

14. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 22.052(b)(2)(a) (Vernon Supp. 2007); TEX. FIN. CODE ANN. § 156.204 (Vernon Supp. 2007); TEX. OCC. CODE ANN. § 901.252 (Vernon 2004).

15. *See* 8 U.S.C.A § 1154 (2008).

16. BLACK'S LAW DICTIONARY 714 (8th ed. 2000).

doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation.”<sup>17</sup>

Other definitions found online include a requirement that the applicant be “law abiding and free from drug or alcohol dependency.”<sup>18</sup> Another definition found online at an immigration law website defines good moral character as “character which measures up to the standards of average citizens of the community in which the applicant resides . . . .”<sup>19</sup>

### III. SIMILARITIES AND DIFFERENCES BETWEEN THE GOOD MORAL CHARACTER LICENSING STANDARD AND THE OCCUPATIONS CODE LICENSING STANDARD

The Act requires the Commissioner of the Savings and Mortgage Lending Agency to deny a license if the applicant fails to satisfy certain statutory licensing criteria listed in section 156.204 of the Texas Finance Code.

The commissioner may deny a license under Texas Finance Code section 156.204, subparts (a)(6), (c)(5), and (d), because the applicant either has a conviction or deferred adjudication for an offense that is “directly relate[d]” to the license.<sup>20</sup> In this paper, I may occasionally refer to this as the “Occupations Code Standard.” In addition, the commissioner may deny a license under Texas Finance Code section 156.204, subparts (a)(7) and (c)(6), because the applicant fails to “satisfy the commissioner as to the individual's good moral character, including the individual's honesty, trustworthiness, and integrity.”<sup>21</sup> Often, the commissioner denies a

---

17. Fla. Bd. of Bar Exam'rs re G.W.L., 364 So.2d 454, 458 (Fla. 1978); *see also* *Petition of Wright*, 690 P.2d 1134, 1136 (Wash. 1984); *Application of T.J.S.*, 692 A.2d 498, 501 (N.H. 1997).

18. RAYMOND L. WOODCOCK, TAKE THE BAR AND BEAT ME 130 (1991).

19. Savitz Law Offices, P.C., U.S. Citizenship Fact Sheet: Acquiring Citizenship through Naturalization,

[http://www.immigrationoptions.com/documents/Citizenship\\_Fact\\_Sheet.doc](http://www.immigrationoptions.com/documents/Citizenship_Fact_Sheet.doc).

20. *See* TEX. FIN. CODE ANN. § 156.204 (a)(6), (c)(5) (Vernon Supp. 2007) (authorizing the commissioner to deny a license if the applicant has a conviction directly related to the license); *see also* § 156.204(d) (directing that a deferred adjudication should be treated as if it were a conviction under section 156.204, subparts (a)(6) and (c)(5)).

21. § 156.204(a)(7), (c)(6).

license under both standards.<sup>22</sup> This occurs when the applicant has a conviction or a deferred adjudication for a crime directly related to the license and has failed to satisfy the commissioner of his or her good moral character, including honesty, trustworthiness, and integrity.<sup>23</sup>

In granting or denying a license based on a conviction directly related to the license, the Occupations Code requires an agency to consider facts related to the applicant and the applicant's criminal history.<sup>24</sup> Among the facts that the agency must consider are:

- the nature and seriousness of the applicant's crimes;<sup>25</sup>
- opportunities which a license would offer the applicant to commit crimes similar to those for which the applicant was convicted;<sup>26</sup>
- the applicant's age at the time of any convictions or deferred adjudications compared with the applicant's present age;<sup>27</sup>
- how much time has elapsed since the last offense;<sup>28</sup>
- evidence of rehabilitation including work before and after conviction and rehabilitative efforts while under supervision;<sup>29</sup>
- recommendations from law enforcement and corrections officials and from the public;<sup>30</sup>
- payment of any restitution and fines ordered by the court;<sup>31</sup> and
- support of dependents.<sup>32</sup>

---

22. See, e.g., *In re Wonaldolynn Wiltz*, Appeal from Denial of an Application for a Loan Officer License, No. S-2121-64099 (Feb. 22, 2007); *In re Kelvin Glenn McKnight*, Appeal from Denial of an Application for a Loan Officer License, No. S-2111-62904 (Feb. 17, 2007); *In re Willie Lee Holmes, Jr.*, Application for a Loan Officer License Under the Mortgage Broker License Act, No. S-1550-44748 (Sept. 20, 2004), available at <http://www.fc.state.tx.us/adhear.htm>.

23. See cases cited *supra* note 22.

24. TEX. OCC. CODE ANN. §§ 53.022-.023 (Vernon 2004).

25. *Id.* § 53.022(1).

26. See *id.* § 53.022(3).

27. See *id.* § 53.023(a)(2).

28. *Id.* § 53.023(a)(3).

29. *Id.* § 53.023(a)(5).

30. *Id.* § 53.023(a)(6)(A)-(C).

31. *Id.* § 53.023(c)(4).

In addition, the Occupations Code requires each agency to adopt guidelines identifying the offenses that it finds directly relate to the license.<sup>33</sup> The commissioner has adopted these guidelines in the Texas Administrative Code.<sup>34</sup> The offenses that the commissioner has found directly relate to the license include

any violation of any state or federal criminal statute which:

(A) involves theft, misappropriation, or misapplication, of monies or goods in any amount;

(B) involves the falsification of records, perjury, or other similar criminal offenses indicating dishonesty;

(C) involves the taking of bribes, kickbacks, or other illegal compensation;

(D) involves deceiving the public by means of swindling, false advertising or the like;

(E) involves acts of moral turpitude and violation of duties owed to the public including, but not limited to, the unlawful manufacture, distribution, or trafficking in a controlled substance, dangerous drug, or marijuana;

(F) involves acts of violence or use of a deadly weapon;

(G) when considered in connection with several other violations committed by the same person over a period of time forms part of a pattern showing a lack of respect for, disregard for, or, apparent inability to follow, the criminal law; or

(H) involves any other crime which the Commissioner determines has a reasonable relationship to whether a person is fit to serve as a Mortgage Broker or Loan Officer in a manner consistent with the purposes of the Act and the best interest of the State of Texas and its residents.<sup>35</sup>

---

32. *Id.* § 53.023(c)(2).

33. § 53.025(a).

34. *See* 7 TEX. ADMIN. CODE § 80.2(13)(A)-(H) (West 2007).

35. *Id.*



When determining to deny a license based on moral character grounds, there is no statute requiring an agency head to consider facts similar to those under the Occupations Code. However, under the case law related to the good moral character requirement, the agency head must make some of the same analysis required by the Occupations Code.<sup>36</sup>

IV. CASE LAW ALLOWING A LICENSING AUTHORITY TO DENY A  
LICENSE FOR LACK OF GOOD MORAL CHARACTER ONLY WHEN  
THERE IS A RATIONAL RELATION BETWEEN THE CONDUCT THAT IS  
THE BASIS FOR DENIAL AND THE DUTIES OF THE LICENSE IF GRANTED

An important Texas Supreme Court decision denying a license on good moral character grounds is *Board of Law Examiners of Texas v. Stevens*.<sup>37</sup> Mr. Stevens was an applicant for a law license who had not paid taxes or filed income tax returns for fourteen consecutive years and who had several unpaid judgments against him.<sup>38</sup> The Board of Law Examiners of Texas (Board) denied his license on good moral character grounds, and Mr. Stevens appealed.<sup>39</sup> A Travis County district court reversed the decision of the Board, and the Board appealed to the Third Court of Appeals in Austin.<sup>40</sup>

In its decision, the appellate court upheld the ruling of the district court.<sup>41</sup> The Board subsequently appealed to the Texas Supreme Court, which reversed both the district court and the appellate court.<sup>42</sup> The Texas Supreme Court held there was adequate protection of the due process rights of Mr. Stevens and others similarly situated.<sup>43</sup> The protection requires a rational relation between the conduct forming the basis for the denial and the acts the

---

36. See discussion *infra* Part IV.

37. Bd. of Law Exam'rs of Tex. v. Stevens, 868 S.W.2d 773 (Tex. 1994), *cert. denied*, 512 U.S. 1206 (1994).

38. *Id.* at 774.

39. Bd. of Law Exam'rs of Tex. v. Stevens, 850 S.W.2d 558, 559 (Tex. App.—Austin 1992), *rev'd*, 868 S.W.2d 773 (Tex. 1994).

40. *Id.*

41. *Id.* at 559.

42. *Stevens*, 868 S.W.2d at 774.

43. *Id.* at 777.

license would authorize the applicant to perform.<sup>44</sup> The Texas Supreme Court found Mr. Stevens's failure to pay his taxes and the judgments against him suggested disrespect for the law.<sup>45</sup> Because of that disrespect, a reasonable person might rationally conclude, as the Board did, that Mr. Stevens would be unlikely to abide by the rules governing lawyers if the Board granted the license.<sup>46</sup> The Texas Supreme Court, therefore, upheld the denial of the license.<sup>47</sup>

*Stevens* is an important decision in the discussion of good moral character as a licensing standard. Under *Stevens*, the Texas legislature may use the phrase good moral character as a standard in drafting and enacting licensing statutes.<sup>48</sup> However, under *Stevens*, there must be a rational relationship between the conduct forming the basis for denial on good moral character grounds and the acts the applicant would perform under the license.<sup>49</sup> The agency cannot deny a license on good moral character grounds unless such a rational relationship exists.<sup>50</sup>

An important United States Supreme Court case, *Schwartz v. Board of Bar Examiners of New Mexico*, requires a rational relationship between the conduct forming the basis for denial of a license on good moral character grounds and the conduct the applicant would perform under the license.<sup>51</sup> The case also requires licensing authorities to consider evidence of rehabilitation as part of the licensing decision before denying a license on moral character grounds.<sup>52</sup>

In *Schwartz*, New Mexico licensing authorities denied Mr. Schwartz a law license based solely on conduct that terminated almost twenty years before he applied for the license, although his present conduct was exemplary and had been for some time.<sup>53</sup> Mr. Schwartz

---

44. *Id.*

45. *Id.* at 781.

46. *Id.*

47. *Id.*

48. *Id.* at 776.

49. *Id.* at 781.

50. *Id.*

51. *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957).

52. *Id.* at 243.

53. *Id.* at 234-35.

was a member of the Communist Party until 1940.<sup>54</sup> He also had numerous arrests as a labor union organizer in the 1930s, none of which resulted in a conviction.<sup>55</sup> Mr. Schware had a distinguished war record as a paratrooper in World War II, and led an exemplary life from the time he received his honorable discharge from the military until the time he applied for his license.<sup>56</sup> He did well in law school and had numerous good character references.<sup>57</sup> Since 1940, his record contained no blemishes.<sup>58</sup>

Under these facts, the Court held that good moral character is a valid licensing criterion.<sup>59</sup> The Court went on to hold, however, that after considering the record as a whole, the licensing authorities had no rational basis for denying Mr. Schware's license.<sup>60</sup> The Court found that the record contained no evidence to support a finding that licensing Mr. Schware as a lawyer presented a threat to the public or that he was not of good moral character.<sup>61</sup>

Because of *Schware*, state authorities who license attorneys must consider rehabilitation issues in their decision to grant or deny a law license under the good moral character standard.<sup>62</sup> These rehabilitation issues are essentially the same that the Occupations Code requires Texas licensing authorities to use in licensing ex-offenders.<sup>63</sup> The American Bar Association (ABA) developed a list of rehabilitative factors that it suggests boards of law examiners should consider to comply with *Schware*.<sup>64</sup> The ABA recommended list of factors is nearly identical with the list in the Occupations

---

54. *Id.* at 236-37.

55. *Id.*

56. *Id.* at 237-38.

57. *Id.* at 238-40.

58. *Id.* at 246-47.

59. *Id.* at 239.

60. *Id.* at 246-47.

61. *Id.*

62. *See id.* at 234-36.

63. *See* TEX. OCC. CODE ANN. §§ 53.022-.023 (Vernon 2004).

64. *See* NAT'L CONFERENCE OF BAR EXAM'RS & THE ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENT 2007 vii (Erica Moeser & Margaret Fuller Corneille eds., 2007) [hereinafter BAR ADMISSION COMPREHENSIVE GUIDE].

Code.<sup>65</sup> The ABA list requires that the licensing authority consider:

- the applicant's age at the time of the conduct
- the recency of the conduct
- the reliability of the information concerning the conduct
- the seriousness of the conduct
- the cumulative effect of the conduct or information
- the evidence of rehabilitation
- the applicant's positive social contributions since the conduct
- the applicant's candor in the admissions process
- the materiality of any omissions or misrepresentations.<sup>66</sup>

It is my supposition that the courts will require any licensing authority to consider similar rehabilitation factors in granting or withholding a license on good moral character grounds under *Schware* and similar decisions.

#### V. HOW THE GOOD MORAL CHARACTER AND OCCUPATIONS CODE STANDARD ISSUES ARISE

The Texas Savings and Mortgage Lending Department requires all applicants for a mortgage broker or mortgage loan officer license to complete and file a license application form.<sup>67</sup> Among the questions on the form is one asking if a court has ever convicted or imposed a deferred adjudication sentence on the applicant.<sup>68</sup> If the applicant answers the question “yes,” the applicant must provide the department with complete information about the incident, including copies of all related court documents.<sup>69</sup> The applicant must answer all questions on the application under oath and send fingerprints to the department with the application.<sup>70</sup>

---

65. Compare *id.*, with §§ 53.022-.023.

66. BAR ADMISSION COMPREHENSIVE GUIDE, *supra* note 64, at viii.

67. TEX. FIN. CODE ANN. § 156.203(a)(3) (Vernon Supp. 2007).

68. Tex. Dep't of Sav. & Mortgage Lending, Mortgage Broker/Loan Officer License Application Package, <http://www.sml.state.tx.us/MBApplicationForm.pdf>.

69. *Id.*

70. *Id.*

As soon as the applicant files the application, the department sends the fingerprints to the Federal Bureau of Investigation (FBI) and the Texas Department of Public Safety (DPS), and assigns an investigator to review the application.<sup>71</sup> Once a report on the fingerprints is received, the investigator compares the information provided by the applicant with the criminal history information provided by the FBI and the DPS.<sup>72</sup> If the information provided by the applicant is consistent with the criminal history information, the investigator continues to process the application.<sup>73</sup> If the information provided by the applicant is inconsistent with the FBI and DPS information, the investigator asks the applicant to explain.<sup>74</sup> If the applicant did not provide copies of the court papers related to his or her convictions or deferred adjudications, the investigator also asks the applicant for this information.<sup>75</sup>

When all information on the application is complete, the investigator forwards the file to the department's director of licensing.<sup>76</sup> The director looks to see if the applicant has satisfied all license requirements (only some of which involve the good moral character standard or Occupations Code Standard). The director looks to see if the applicant has provided information that is inconsistent with information that the investigator received from other sources. The director also looks to see if the applicant has a clean record or has only minor offenses or more serious offenses old enough that the director believes they are not relevant to the applicant's current and future behavior. If the applicant passes all of these tests, the director recommends that the commissioner approve the application. Otherwise, the director recommends that the

---

71. § 156.206(b).

72. The Department regularly presents evidence that these are their procedures in almost every hearing. Several of my decisions, which are online, describe these procedures. *See, e.g., In re Charlene Quentee Sutton*, Loan Officer Applicant, License Application No. 66494, File No. O79014, No. S-2200-66494 (October 29, 2007); *In re Maria Elena Perez*, Appeal from Denial of a Loan Officer License, No. S-2211-65562 (October 16, 2007); *In re Thomas Monroe Egans*, Applicant for a Loan Officer License, No. S-1783-51371 (July 25, 2005), available at <http://www.fc.state.tx.us/ALJ/pfd-sl.htm>.

73. *See cases cited supra* note 72.

74. *See cases cited supra* note 72.

75. *See cases cited supra* note 72.

76. *See cases cited supra* note 72.

commissioner deny the application.<sup>77</sup>

The Commissioner of the Savings and Mortgage Lending Agency personally reviews every application.<sup>78</sup> The commissioner decides whether to grant or deny each application based on the information collected by the staff, the information furnished by the applicant, the licensing director's recommendation, and the commissioner's own opinions after a thorough review of the file.<sup>79</sup> If the commissioner denies the application, he writes the applicant a letter explaining why he did so.<sup>80</sup> The letter also tells the applicant of his or her right to a hearing to contest the denial.<sup>81</sup> The applicant may then accept the commissioner's decision denying the application or may appeal the denial.<sup>82</sup> If the applicant chooses to appeal, he may do so by filing the appeal within ten days of receipt of the commissioner's letter denying the license.<sup>83</sup> Section 156.209 of the Texas Finance Code mandates these procedures.<sup>84</sup>

---

77. The director and her staff have frequently testified before me that these are the procedures used to review all mortgage broker and loan officer license applications. *See* cases cited *supra* note 72.

78. TEX. FIN. CODE ANN. § 156.207(a) (Vernon Supp. 2007).

79. *Id.*

80. *Id.* § 156.209(a).

81. *Id.*

82. *Id.*

83. *Id.* This procedure mirrors the application investigation procedures used in many other state and federal agencies. It tracks a procedure discussed with approval by Professor Frank E. Cooper in his state administrative law treatise. *See* 2 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 484-85 (1965). The vast majority of license applications at the Texas Savings and Mortgage Lending Department are approved on review of written documents without the need for a hearing. Professor Cooper says that, in this type of review, due process is preserved provided the applicant is given the opportunity for a de novo hearing if the application is denied. *Id.* The procedure used for review of license applications in the Act is the same as the one described by Professor Cooper. *See also* Fred P. Parker III, *Procedural Due Process in Bar Admission Proceedings*, THE BAR EXAMINER, Feb. 1992, at 15-19 (describing virtually identical procedures to review license applications for admission to the State Bar of Florida and stating that these procedures satisfy all constitutional requirements).

84. § 156.209.

## VI. THE HEARING

If the applicant appeals, I review the denial in a de novo hearing. I conduct the appeal pursuant to Chapter 2001 of the Texas Government Code, the Texas Rules of Evidence, and the hearing rules of the Texas Finance Commission. The applicant has the burden to prove that he or she satisfies all license requirements,<sup>85</sup> including the requirement of no convictions or deferred adjudications for offenses directly related to the license (or eligibility for the license under Chapter 53 of the Occupations Code).<sup>86</sup> The applicant also has the burden to prove his or her good moral character, including attributes such as honesty, trustworthiness, and integrity.<sup>87</sup>

The department is usually first to put on its evidence about why it denied the application.<sup>88</sup> The investigator or director of

---

85. 7 TEX. ADMIN. CODE § 9.25(c) (West 2007).

86. TEX. FIN. CODE ANN. § 156.204.

87. The Finance Commission Hearing Rules mandate the placing of the burden on the applicant to prove he or she satisfies all license requirements. 7 TEX. ADMIN. CODE § 9.25(c)-(d). These include the Occupations Code Standard and the good moral character standard. The burden is also on the applicant under the common law. See 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 355 (1965).

The state courts quite uniformly impose on agencies the customary common-law rule that the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion. This means, of course, that when an applicant appears before an agency seeking to establish a claim or obtain a license, the burden is on him. Conversely, when the agency is the moving party, the burden is on it

*Id.*; accord *Scott v. Dep't of Commerce & Cmty. Affairs*, 416 N.E.2d 1082, 1088 (Ill. 1981); *Gourley v. Bd. of Trs.*, 289 N.W.2d 251, 253 (S.D. 1980); *Wonder Life Co. v. Liddy*, 207 N.W.2d 27, 31 (Iowa 1973); *Int'l Minerals & Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 466 P.2d 557, 560 (N.M. 1970); E. CLEARY, MCCORMICK ON EVIDENCE § 357 (3d ed. 1984). Many of the above cases quote text from the Cooper treatise. They then declare the law to be that the burden of proof should be on the license applicant to demonstrate that he or she meets all licensing requirements. See also *State v. McFarren*, 215 N.W.2d 459, 463-64 (Wis. 1974); *Porter v. Riverdale Sch. Dist.*, 536 P.2d 1265, 1268 (Or. Ct. App. 1975) (both quoting the McCormick treatise providing that the burden is on the applicant to show that he or she satisfies all licensing requirements in administrative agency licensing hearings).

88. Traditionally, an applicant challenging the denial of his or her license should go first because the applicant bears the burden of proof. See sources cited *supra* note 87. However, most of the license applicants who appear before me are

licensing applications testifies. As part of its presentation, the department introduces into evidence copies of all documents relevant to the case. The documentary evidence usually consists of the application, any court documents related to the applicant's convictions or deferred adjudications, all correspondence between the applicant and the department's investigator, the commissioner's letter stating his reasons for denying the application, the notice of appeal, and the notice of hearing.<sup>89</sup> After the department rests, the applicant then puts on his case by calling character witnesses and testifying himself, if he desires. I allow both sides to cross-examine the other's witnesses, and I apply the rules of evidence in the same manner as they would be in a case tried before a state trial judge sitting without a jury.<sup>90</sup>

#### VII. SOME FACTORS HELD TO EVIDENCE GOOD AND BAD MORAL CHARACTER, AND SOME FACTORS TO NEVER CONSIDER IN MAKING MORAL CHARACTER DETERMINATIONS

I based this section of the paper largely on Daniel C. Brennan's article *Defining Moral Character and Fitness*.<sup>91</sup> Mr.

---

*pro se*. A *pro se* applicant finds the hearing procedure difficult. It is less difficult for the applicant if the agency goes first, introduces any relevant documentary evidence, explains what it sees as the deficiencies in the license application, and stipulates the applicant satisfies all other statutory licensing criteria. The Finance Commission agencies are willing to do this and it speeds up the hearings by focusing on just the key issues. This is important because I conduct these hearings back-to-back—sometimes as many as eight to ten in a day. When the agency goes first and presents its evidence supporting denial of the license, the *pro se* applicant is able to focus his cross-examination, direct evidence, and rebuttal evidence on only the relevant issues. I always explain to the applicant that he has the burden of proof and may go first if he wants to do so, but most of the time, the applicant elects to have the agency put on the case for denial first.

89. There are hundreds of transcripts containing these exhibits as the department's documentary evidence on file with me. These are available for inspection by contacting my docket clerk, Mr. David Getz, at dgetz@sml.state.tx.us.

90. These procedures are required by the Texas Rules of Evidence and are adopted by reference in the Administrative Procedure Act at section 2001.081 of the Texas Government Code, and in the Finance Commission Hearing Rules at title 7, section 9.26, of the Texas Administrative Code.

91. Daniel C. Brennan, *Defining Moral Character and Fitness*, THE BAR EXAMINER, Nov. 1989, at 24-30.



Brennan, the principal attorney for the admissions office of the New York courts when he wrote the article, prepared some lists that are helpful when looking at the good moral character issue. I largely used his lists, but added and deleted some items because I did not always agree with his lists. The lists follow.

*A. Factors Which May Evidence Present Good Moral Character and Fitness*

Courts may take into account the following factors:

- honesty;
- fairness;
- reliability;
- integrity;
- candor in dealing with licensing authorities;
- trustworthiness;
- observance of fiduciary duty;
- respect for the rights of others;
- fiscal responsibility;
- mental and emotional stability;<sup>92</sup>
- in the event of a past criminal record, strict compliance with all court orders, payment of all fines, restitution, or penalties, acceptance of responsibility for behavior, and an indication of remorse;<sup>93</sup>
- completion of sentence including all supervised release for past offenses;
- passage of a substantial period of time without repetition of any past misconduct since release from supervision;<sup>94</sup>
- strong community ties and good support system (family, friends, job);<sup>95</sup> and

---

92. *Id.* at 24-25.

93. TEX. OCC. CODE ANN. § 53.023(c)(4) (Vernon 2004); *see* Brennan, *supra* note 91, at 25.

94. § 53.023(a)(3); *see* Brennan, *supra* note 91, at 25.

95. § 53.023(a)(6)(C); *see* Brennan, *supra* note 91, at 25.

- support of dependents.<sup>96</sup>

*B. Factors Which May Evidence Lack of Good Moral Character and Fitness*

Courts may also take into account the following negative factors to determine whether an applicant lacks good moral character:

- Conviction of a crime of moral turpitude.
- Conviction of any crime involving breach of fiduciary duty.
- Mental or emotional instability.
- Dishonesty.
- Taking unfair advantage of others.
- Disloyalty to those to whom loyalty is legally owed.
- Irresponsibility in business or professional matters.
- Fiscal Irresponsibility.
- Failure to pay ordered child support; and
- Spouse or child abuse.<sup>97</sup>

In addition to the above, courts may take into account the following negative factors:

- abuse of alcohol and controlled substances;
- criminal activity whether prosecuted or not;
- dishonorable discharge from any branch of the armed services;
- illegal activity involving firearms;
- improper activity while previously licensed;
- noncompliance with court orders;
- acceptance of deferred adjudication for any crime which would be grounds for denial, suspension, or revocation of the license sought;
- conviction of any crime which would be grounds for denial,

---

96. § 53.023(c)(2).

97. Brennan, *supra* note 91, at 25, 27.

suspension, or revocation of the license sought;

- engaging in activities for which a license is required prior to obtaining or without obtaining the required license;
- a string of minor or petty offenses which cumulatively may indicate a lack of respect for, or an inability to follow, or an unwillingness to conform behavior to, legal requirements;
- disciplinary action by another licensing authority or voluntary surrender of a license to avoid disciplinary action by another licensing authority; and
- conviction of serious crimes including crimes involving interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file tax returns, deceit, bribery, extortion, theft, or embezzlement; an attempt to commit, a conspiracy to commit, or a solicitation of another to commit a serious crime.<sup>98</sup>

### *C. Factors Never to Consider in Moral Character Determinations*

Courts should never consider the following factors in making moral character determinations:

- the applicant's political affiliations or exercise of First Amendment rights;
- traffic or minor municipal code violations, unless so substantial in number as to indicate a lack of self discipline;
- the applicant's race, gender, or sexual orientation; and
- any conduct remote in time unless extremely serious in nature, recently repeated, or part of a pattern of similar acts continuing over a relatively long period of time.<sup>99</sup>

Mr. Brennan's article indicates the factors that may evidence lack of good moral character require further investigation of the applicant by licensing authorities, but should not necessarily determine whether the state should grant or deny a license.<sup>100</sup> The

---

98. *See id.* at 25-28.

99. *Id.* at 28.

100. *See id.* at 28-30.

licensing agency must look at each applicant as an individual and consider each application on a case-by-case basis.<sup>101</sup>

VIII. APPLICATION OF THE GOOD MORAL CHARACTER STANDARD IN CASES IN WHICH THE APPLICANT HAS CONVICTIONS OF VERY SERIOUS OFFENSES: ARE SOME ACTS SO BAD THAT THE APPLICANT SHOULD NEVER BE RECONSIDERED FOR A LICENSE?

Some people question whether a particular offense is so serious that it will permanently bar licensing. Thomas Arthur Probyecky recently wrote a well-researched and comprehensive article on this topic.<sup>102</sup>

A majority of jurisdictions subscribe to the theory that no matter how serious an offense the applicant committed, a possibility of rehabilitation always remains. Instead of permanently barring the licensing of an offender who commits a particularly serious offense, these states require a stronger showing of rehabilitation for very serious offenses than for less serious offenses.<sup>103</sup>

---

101. See *id.* at 24-30.

102. See Thomas Arthur Probyecky, *Beyond Rehabilitation: Permanent Exclusion from the Practice of Law*, THE BAR EXAMINER, Feb. 2007, at 1, 6.

103. See, e.g., Fla. Bd. of Bar Exam'rs *ex. rel.* J.J.T., 761 So.2d 1094, 1096 (Fla. 2000). The Florida Supreme Court stated, "[I]n evaluating an applicant's showing of rehabilitation, the nature of the past misconduct cannot be disregarded. The more serious the misconduct, the greater the showing of rehabilitation that will be required." *Id.* (citations omitted). See also *In re Belsher*, 689 P.2d 1078, 1083 (Wash. 1984) ("Having previously engaged in serious misconduct, petitioner must 'clearly demonstrate' that he is now worthy of the public trust . . . if doubt remains, fairness to the public . . . requires that [a license] be denied."); *In re Hiss*, 333 N.E.2d 429, 433 (Mass. 1975). The Massachusetts Supreme Court explained its reason for rejecting the idea of permanent disbarment for attorneys as follows:

[T]he serious nature of the crime and the conclusive evidence of past unfitness to serve as an attorney do not necessarily disqualify [the petitioner] at the present time. We cannot subscribe to the arguments . . . that, because the offenses committed . . . are so serious, they forever bar reinstatement irrespective of good conduct or reform. Though in previous cases we intimated by way of dicta that there may be "offenses so serious that the attorney committing them can never again satisfy the court that he has become trustworthy," we cannot now say that any offense is so grave that a disbarred attorney is automatically precluded from attempting to demonstrate through ample and adequate proofs, drawn from conduct and social

Statutes and regulations in other states, including Alabama, Indiana, Iowa, Kentucky, Louisiana, Mississippi, New Jersey, Ohio, and Oregon, provide that some offenses are so bad, they render a person permanently ineligible for a law license.<sup>104</sup>

Chapter 53 of the Occupations Code establishes that the policy of the State of Texas allows rehabilitated persons to return to their former occupations and professions or to undertake new ones.<sup>105</sup> Authorizing an agency to prohibit permanently a person from applying for a license to practice an occupation or profession would require new legislation. Absent such legislation, the licensing agencies have a duty, subject to the Occupations Code, to entertain applications for new licenses or reinstatement no matter how bad the applicant has behaved in the past.<sup>106</sup> Proof of rehabilitation, however, becomes more difficult if an applicant's past offenses were serious.<sup>107</sup> In evaluating an applicant's showing of rehabilitation, the nature of the past misconduct cannot be disregarded.<sup>108</sup> An agency may require a greater showing of rehabilitation based on very serious past misconduct.<sup>109</sup> Many out-of-state cases apply this rule, and Texas will likely follow suit.

## IX. CLOSING THOUGHTS

In closing, it appears a great deal of inconsistency exists in the application of the good moral conduct standard among the various licensing authorities in Texas. I frequently see applications denied to applicants who appear to have satisfied standards used by other licensing agencies concerning the applicant's good moral character.

---

interactions, that he has achieved a "present fitness" to serve as an attorney and has led a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions.

*Id.* (citations and footnotes omitted).

104. *See* IOWA CODE ANN. § 602.10102 (West 2007); KY. REV. STAT. ANN. § 335B.020(1) (West 2006); MISS. CODE ANN. § 73-3-41 (West 2007); OR. REV. STAT. ANN. § 3.10 (West 2005); N.J. R. Ct. 1:27; ALA. BAR ADMISSION R. II; OHIO SUP. CT. R. 5.

105. TEX. OCC. CODE ANN. § 53.023(a)(5) (Vernon 2004).

106. *Id.* § 53.023(a).

107. *Id.* § 53.022(1), (3).

108. *Id.* § 53.023(a)(1).

109. *Id.* § 53.022(1), (3).

---

There is no requirement, however, that all licensing agencies interpret and apply the good moral character requirement exactly the same way, and the differences in duties and responsibilities under the various occupational and professional licenses may justify different application of the good moral character standard.

